Supreme Court, U.S.
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No. 93-53

In The

Supreme Court of the United States

October Term, 1993

MERLIN JAY PHILLIPS,

Petitioner,

v.

BARBARA HEINE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the District Court and Court of Appeals for the District of Columbia Circuit erred in holding that a cause of action brought under the Death On The High Seas Act accrues on the date of death.

Whether the Court of Appeals for the District of Columbia Circuit properly followed this Court's holding in *Reading Co. v. Koons*, 271 U.S. 58 (1926).

Whether the Court of Appeals for the District of Columbia Circuit erred in holding that Petitioner's Complaint was time-barred, despite the finding that equitable tolling may be appropriate in Death On The High Seas Act cases.

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OPINIONS BELOW

The unanimous three judge panel decision of the Court of Appeals for the District of Columbia Circuit is reported at 984 F.2d 489, and is reprinted in the Appendix to Petition for Writ of Certiorari.

The Memorandum Decision of the United States District for the District of Columbia, District Judge Gasch, has not been reported. It is reprinted in the Appendix to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent respectfully incorporates by reference the Statement of Facts as stated by the Court of Appeals for the District of Columbia Circuit, located in the Appendix to Petition for Writ of Certiorari at 5a.

REASONS FOR DENYING THE WRIT

I. The date of accrual for a cause of action brought under the Death On The High Seas Act commences with the date of probable death.

The provision governing the statute of limitations for the Death On The High Seas Act ("DOHSA") unambiguously states that litigation must be "commenced within three years from the date the cause of action accrued." 46 U.S.C. §763(a). The plane in which Petitioner's decedent was a passenger disappeared on March 21, 1987. Petitioner's lawsuit was not commenced against the pilot's estate until December 12, 1990. Therefore, as

Petitioner readily concedes, if the cause of action "accrued" on the date of the plane's disappearance and presumed crash, Petitioner's claim is time-barred. This was the holding of both the District Court and the Court of Appeals.

Nevertheless, Petitioner invites this Court to manipulate the plain meaning of the statute to permit the prosecution of his claim. The first theory Petitioner advances is that the date of accrual is not March 21, 1987, the date the plane disappeared. Instead, Petitioner would have the accrual date commence when the State of California issued a death certificate for Petitioner's decedent (March 20, 1990) or, alternatively, the date on which a conservator was appointed for Respondent's estate (February 6, 1990). The District Court and the Court of Appeals, in well-reasoned opinions, rejected Petitioner's position, instead opting for the most logical accrual date, the "time of probable death." Both lower courts determined, as a factual matter, "the date of death was indisputedly on or about March 21, 1987, the date upon which the plane disappeared." Panel decision, Appendix to Petition for Writ of Certiorari at 9a.

While it is true, as Petitioner contends, that this Court has not specifically addressed the date of accrual issue in DOHSA cases, this Court as held, in a similar action brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 *et seq.*, that a cause of action accrues at death and not at the time of appointment of a conservator. *Reading Co. v. Koons*, 271 U.S. 58 (1926). Moreover, lower courts have unanimously held that the DOHSA statute follows the reasoning of *Reading Co.* in finding a cause of action to accrue on the date of death. *See Evers v. Evers Marine Service, Inc.*, 487 F. Supp. 1283,

1288 (D. N.J. 1980); *O'Neill v. Cunard White Star, Ltd.*, 69 F. Supp. 943, 945-46 (S.D.N.Y. 1946). In fact, no court has adopted, even in *dictum*, the position Petitioner puts forth. The fact that this Court has not decided the precise issue upon which Petitioner's case turns has never been viewed as a legitimate basis for granting a writ of certiorari.

Not only is Petitioner's argument contrary to established precedent, the practical results of Petitioner's theory would be detrimental to the development of the law. As Judge Williams, writing for a unanimous panel which also included Judges Ruth Bader Ginsburg and Edwards, pointed out, delaying the accrual date until a death certificate is issued or a conservator for Respondent's estate is appointed "would supplant a definite period [of limitations] with a highly elastic one." Panel decision, Appendix to Petition for Writ of Certiorari at 8a. Such a result flies in the face of such well-established statute of limitations principles as repose for potential defendants and the prevention of stale or faded memories of potential witnesses.

II. Petitioner's untimely Complaint cannot be saved by equitable tolling.

In addition to the self-styled "rarefied" argument advanced by Petitioner regarding the date of accrual of a DOHSA cause of action, Petitioner alternatively seeks to invoke the doctrine of equitable tolling. As the Court of Appeals observed, "federal statutes of limitation are subject to the doctrine of equitable tolling, which shelters the plaintiff from the statute of limitations in cases where

strict application would be inequitable." Panel decision, Appendix to Petition for Writ of Certiorari at 9a.

The Court of Appeals presumed, for purposes of discussion and without deciding the issue, that equitable tolling may apply to DOHSA cases. The Court of Appeals further assumed that Petitioner acted reasonably in attempting to obtain the necessary death certificate, though Judge Williams added in a footnote that "[t]his assumption is generous to appellant," and wondered aloud why Petitioner "needed two years after the State Department declared itself unable to help to request a certificate of death from the California courts." Panel decision, Appendix to Petition for Writ of Certiorari at 9a-10a. Nevertheless, the panel held, despite the application of equitable tolling, Petitioner's claim was still untimely.

Even Petitioner concedes that a party who sleeps on his rights should not be rewarded in equity. The Court of Appeals determined that any justifications for delay ended with the issuance of the California death certificate, almost a full month before the three year statute of limitations naturally expired. Panel decision, Appendix to Petition for Writ of Certiorari at 10a. Nevertheless, Petitioner's suit was not commenced until nine and one-half months had passed following the issuance of the death certificate. A previous version of the DOHSA statute of limitations provision expressly provided for a ninety day tolling period, coupled with a two year statute of limitations. *See* 46 U.S.C. §763 (repealed Pub. L. No. 96-383, October 6, 1980). It is unfathomable to assert that Congress intended to extend the equitable tolling period from ninety days to more than nine and one-half months (as

would be necessary to revive Petitioner's claim) when it specifically deleted equitable tolling from the amended DOHSA statute.

Petitioner also proffers well-known policy arguments that statutes of limitations should not be strictly enforced to the detriment and prejudice of plaintiffs. This is, of course, a legal principle which is widely accepted. As the District Court explained, however, the estates of the two other passengers in the missing plane commenced their respective litigation within the three year limitation by filing complaints and simply waited to perfect service on the defendant. Even though service could not be perfected until a conservator was appointed, there was no reason why Petitioner could not have commenced litigation – like his colleagues on the plane – prior to the expiration of the three year statute of limitations. District Court Opinion, Appendix to Petition for Writ of Certiorari at 3a.

In short, Petitioner's equitable tolling argument presents merely a question of fact as to whether petitioner acted reasonably in pursuing his claim. The issue is not whether equitable tolling may be applied in DOHSA cases, for the Court of Appeals assumed as much. Rather, the issue is a fact question. It is well-settled that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Petitioner fails to make such a showing.

CONCLUSION

The issues offered in the Petition for a Writ of Certiorari are neither novel nor meritorious. There is no disagreement among the federal courts that the accrual date for DOHSA claims is the death of the decedent. Furthermore, Petitioner's equitable tolling argument was soundly rejected by the Court of Appeals and presents to this Court nothing more than a dispute of fact as to whether Petitioner acted reasonably. The Court of Appeals for District of Columbia Circuit satisfactorily and accurately decided these issues. The Petition for Certiorari should, therefore, be denied.

Respectfully submitted,

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